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IN THE

Supreme Court of the United States

October Term, 1970

No. 1379

INTERNATIONAL METAL SPECIALTIES, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTERNATIONAL METAL SPECIALTIES, INC.,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

International Metal Specialties, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit insofar as it granted enforcement of a bargaining order of the National Labor Relations Board.

Opinions Below

The opinion of the court below (Appendix A, infra, p. A1) is reported in 433 F. 2nd 870. The findings of fact, conclusions of law and order of the Board (A24-37)[1] are reported at 172 NLRB 39 (1968).

[1] Refers to the portion of the record printed as a joint appendix to the briefs in the Court of Appeals.

Statement

A. Findings of Fact

Petitioner is a New York corporation, its place of business is in Bronx County, New York, where it is engaged in the fabrication, sale and distribution of metal products and related items. The petitioner then had 32 employees on its payroll. The Union involved in these proceedings is Shopmen's Local Union No. 455.

On June 14, 1966, the union filed a petition for an election with the National Labor Relations Board. On the same date, the union sent the Respondent a telegram claiming a majority and demanding that the Respondent bargain with them.

Pursuant to a consent election agreement, a vote was held on August 17, 1966. The union lost by a vote of 16 to 10 with two challenged ballots. The union filed objections to the election with the Board. The objections were based upon charges which included, among others, illegal raises, improper threats by John Shields and George Garguilo, alleged to be supervisors, and also Gabriel DeRosa of management, and a Section 8 (A) (3) charge concerning an employee Cruz. The regional director dismissed substantially all the charges alleged in the objection to the election except the statement of Mr. DeRosa made on June 15th and a charge concerning a challenge to Cruz an employee as an observer and voter on August 17, 1966.

The union also filed charges of unfair labor practices and the 2 cases were consolidated for hearing and decision.

Over the objection of petitioner's counsel, the trial examiner permitted testimony as to all charges dismissed previously. The testimony indicated that on June 14th

the union had 14 cards signed by employees designating it as its bargaining agent. It moved for an amendment at the hearing to add the date of June 22, 1966, as a repeated demand, basing its claim on a conversation had between the union representative and the attorney for the employer held at the office of the attorney. The union offered another card of one named Joseph Tortillo which was dated June 18th and filed with the Board on August 24th. The union also asked that a card be considered of one named Wheatley who had signed a card in blank and given to one of his friends and destroyed by him and never delivered to the union. No testimony was ever offered as to whether the destruction was intentional or otherwise. This matter was never pursued. There was further testimony in connection with the employment roll of the employer; as to whether Shields and Garguilo were supervisors; and the inclusion of one employee who was then on military leave.

The trial examiner made findings dismissing any charges with respect to the employee Cruz and also any 8 (a) (3) violation. He found that DeRosa had made a statement threatening loss of benefits and possible shut-down of plant if the union was selected as bargaining agent despite the fact that the issue was not free from doubt and elicited by General Counsel by leading questions (A11). The trial examiner found no evidence of illegal increases; and, while he found Garguilo to be a supervisor, he did not make any findings regarding Shields. He found, further, that no remedial order under Section 8 (a) (5) should issue, and ordered a new election; also, that the union could, at best, establish 16 out of 29 employees as having cards although it was clear to him that the cards were unreliable as proof of employee sentiment.

His order for a new election was based upon his finding that the impact of any violation was of minimal effect, if any, on an election held more than 60 days after the date of the said violation.

The election case was severed, and the matter came before the Board on the unfair labor practice charge. The Board overruled the trial examiner on the issue of the supervisory status of one Shields and the statement of Shields of June 20, 1966, wherein Shields had suggested that a committee be formed to negotiate with the employer and found same was violative of Section 8 (A) (1). It overruled the trial examiner as to his findings that the merit increases were not improper; and also found that the employer had violated Section 8 (A) (5) by refusal to bargain with the union. As to the findings concerning the statements of DeRosa and Garguilo, Board member Zegoria dissented stating that he did not find the same a violation. The Board also overruled the examiner's finding, that the holding of a free and fair election was possible, by issuing a bargaining order.

B. The Board's Order

Having found that the Respondent is engaged in certain unfair labor practices, it ordered the employer to cease and desist therefrom and to take certain affirmative action; and further ordered the employer to bargain collectively with the union.

C. The Decision of the Court of Appeals

The Court below upheld the Board findings and order, and granted an enforcement order (Appendix A, *infra*, Page 1).

Jurisdiction

The judgment of the Court of Appeals was entered on November 30, 1970 (Appendix A, *infra,* pp. 7). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Did the Board's determination in this case meet the criteria established by this Court in a later decision in *Gissel* v. *National Labor Relations Board* (395 U. S. 575 (1969)); and was the Board's order inappropriate, arbitrary and improper in view of the guidelines established by that case?

2. Should the Appellate Court have exercised more judicial scrutiny in this case when the Board itself was split on the issue of unfair labor practices, and where the Board overruled its trial examiner's findings on findings of fact and conclusions of law; and did the Appellate Court, thereby fail to exercise its power of judicial review?

3. Should the Supreme Court, at this time, clarify the confusion stemming from the interpretation of the *Gissel* case, and serve to resolve the apparent conflict between various Circuit Courts of Appeal and the Labor Board, not only with respect to remedial powers, but as to matters involving free speech and permissible conduct?

4. To give effect to the overriding purposes of the National Labor Relations Act, should the Supreme Court make a determination concerning standards to be applied in connection with union cards, cut-off date and majority status of unions?

The Statutes Involved

The relevant provisions of the National Labor Relations Act are set forth in (Appendix B, *infra*, pp. 1 to 2).

Reasons for Granting the Writ

The rule of law continues to elude a substantial part of the industrial community. Despite the many years of existence of the National Labor Relations Act, confusion appears to mount in several areas. 1. The different interpretations as to how far the Board may go in effecting any remedies in enforcements, 2. how far will the Courts go in relying on "expertise" of an administrative agency of the government, and thereby limiting its judicial scope and review. The need is great for proper enforcement of the Act. The Board should use only that statutory power to give effect to such enforcement, but it should not exceed its statutory powers. If it is to effect any affirmative action, it should not be punitive. Mr. Justice Burger has previously stated "The power to command affirmative action is remedial, not punitive." *

The fashioning of remedies by a Board, after findings, still remains a recurrent and unyielding problem. The *Gissel* case, *supra*, set forth certain guidelines and principles which should be followed by the Board and by the Courts. At this time, we are not convinced that the Board can be properly aware of the dimensions of the problem unless this Court reaffirms its position again

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* *See Local 57, International Ladies' Garment Workers' Union, AFL-CIO* v. *National Labor Relations Board, Garwin Corporation, et al.*, 374 F. 2d 295, also 387 U. S. 942, 87 Sup. Ct. 2074, 18 L. Ed., 2nd page 1328.

and clarifies the confusion that is present in the various interpretations of the *Gissel* decision, not only by the Board but by various Circuit Courts of Appeal. What about cases decided by the Board before *Gissel?* Would the holding in the case at bar have been any different had the Board been guided by *Gissel?* In retrospect, did this case and the findings of the Board meet the criteria of that important case? We believe that it did not, and that if the Court of Appeals had properly scrutinized and reviewed the findings, not only of the Board but of the trial examiner, the hearer of the facts, which the Board overruled, then, the Court would not have issued the enforcement order in this case. We firmly believe that the Court of Appeals has, in effect, frustrated an important aspect of national labor policy in not subjecting the findings in this case to the strict scrutiny that it demands, and that the petition for certiorari herein should, therefore, be granted for the reasons hereinafter stated.

The Courts, perhaps more than the scholars, pay fairly consistent tribute to the "expertise" and to the "informed discretion" of the administrative agency and thereby bestows on such agency by judicial fiat a power it never had. Expertise, the strength of modern government, can become a monster which rules with no practical limit on its discretion. The function of an agency is the administration of law; no more no less, and the agency should call the facts as it sees them, and to apply the law as Congress enacted it.*

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* Administrative Law by Walter Gelhorn and Clark Byse, 4th edition 1960 pages 25, 26, 29, and quoting Mr. Justice Douglas and Judge Prettyman in excerpts from Legal Institutions Today and Tomorrow by Warner W. Gardner (M. G. Paulsen edition 1959). See also pages 34 to 38 an article by Justin Miller "Advocate Before Administrative Agency" 1956 University of Illinois Law Forum, pages 189, 190, 197 to 202.

Pragmatic as well as theoretical consideration support the proposition that Judges rather than a Commissioner should shape the outline of our national economic policy when Congress has not stated its will.*

In the case at bar, the Appellate Court immediately limited its judicial review by stating "Our review of the Board's findings of fact is *confined* (Italics ours) to a determination . . . giving due regard to the Board's *expertise* (Italics ours). (Appendix A3.)

The Court cited *Universal Camera* v. *NLRB,* 340 U. S. 474, 488 (1951).** We submit that expertness is not a magic wand which could be indiscriminately waved over an agency's findings to preserve them from review.

The Court, in the instant case, discussing the issue of supervisory status, stated "The question of management or employment status is properly entrusted to the Board's expertise" (Appendix A, p. 4). We submit that the Court should have carefully reviewed this issue and applied the definition of a supervisor embodied in Section 2 (11) of the National Labor Relations Act and had been

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* 67 Harvard Law Review 436, 471-475 (1954). The Courts may derive premises from the august implications of the Constitution, and to provide judicial review to guarantee the deeply human claims of the individual against the pretensions of the merely expert.

69 Harvard Law Review 239, 276 (1955), article by Louis L. Jaffe, Judicial Review: Questions of Law.

See also *Mitchell* v. *U. S.*, 313 U. S. 80, also *Henderson* v. *U. S.* (339 U. S. 816) (1960). See also Mr. Justice Hughes in 313 U. S. at page 97.

** We respectfully refer to Louis L. Jaffe "Judicial Review: Question of Fact" 69 Harvard Law Review 1020 (April 1956) at page 1038, where he quotes Mr. Justice Frankfurter's test of substantiality and expertness.

further guided by law with respect to the same. See *Nat Harrison Associates* against *Local 728, International Brotherhood of Electrical Workers,* 1969 CCH NLRB Paragraph 21012 (177 NLRB 24) decided June, 1969. Also pertinent is *NLRB* v. *American Cable,* 414 Fed. 661, 5th Circuit (1969) where the Court citing *NLRB* v. *National Guard Service,* 384 Fed. 143, 147, 5th Circuit at P. 151 "If any authority over someone else, no matter how insignificant or infrequent made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order giver is not a supervisor. Even the traffic director tells the President of a company where to park his car".

The Circuit Court further affirmed the Board's expertise in supporting the Board's holding overruling the trial examiner's finding with regard to the propriety of merit increases which had been given irregularly over a period of years depending upon development of skills of unskilled workers *; also, its acceptance of the speculation of the Board concerning the Wheatley card which had been destroyed without ever having been delivered to the union and without explanation although Wheatley testified and no evidence submitted as to whether the same was intended for transmittal to the union; similarly, the extension by the Board of the cut-off date from June 14th to June 22nd which permitted the addition of the card of one, Tortillo, dated June 18th and filed August 24th. All this, despite the ruling of the trial examiner that it could not contribute to the union's total (A191).**

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* See (A13) (A59, 61) and to the same effect *W. T. Grant Company and Retail Store Employees Local 954,* in 1969 CCH, NLRB 2105 and particularly the excerpt from the Board decision on page 26825.

** See also *NLRB* v. *J. M. Machinery Corp.*, 5th Circuit decided 4/9/69, 60 L. C. Paragraph 10014.

Determination with respect to supervisory status, destroyed card and the manipulation of a cut-off date to permit an extra card to be considered was very important in that it would have disclosed that the union did not have the claimed majority at the time of the demand.

Regarding the propriety of a bargaining order, once again the Court relied upon the Board's discretion by interpreting Gissel "Entrusting to the Board almost total discretion to determine when a bargaining order is proper" (App. A6). We submit that the above quote of the Court's interpretation of Gissel should be read in the total context of said decision, and the succeeding paragraph from the *Gissel* decision should be controlling in the case at bar. "We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which because of their minimal impact on election machinery, will not sustain a bargaining order. There is . . . no per se rule that the commission of any unfair labor practice will automatically result in a . . . violation and the issuance of an order to bargain, etc.," *Gissel supra.*

While the Court should inquire into whether or not an administrator acted according to law, we contend that in this context "law" means not only applicable statutes but also the common law concepts of due process and fair play and avoidance of arbitrary action. While the purpose of the writ is not to reevaluate questions of fact, it is also important to understand that the absence of substantial evidence to support findings of fact does, of course, constitute in itself error of law.*

The Circuit Court, in granting an enforcement order herein, in its opinion (Smith, J.), states (App. A, page

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* See *State ex rel. Bale* v. *McPhee*, 6 Wisc. 2nd, 190, 94 N. W. 2nd 711, also *Oliver Iron Mining Co.* v. *Commissioner of Taxation*, 247 Minn. 6, 10, 76 N. W. 2nd 107, 111, also *Jackson* v. *People*, 9 Mich. 111.

6): "The violations in this case *marginal though they may appear to some* (italics ours) considerably exceeds the violation in Sinclair v. NLRB one of the cases decided in the Gissel decision." We strongly urge that a judicial scrutiny would have most certainly impelled the conclusion that the violations herein were not only marginal as the Court indicated but questionable altogether. One member of the Board, Zagoria, found no violation in the statements made by any of the individuals (A25). The trial examiner found that the issue of the violation was not free from doubt and, that, in any event, the impact of the same, especially, when there was no further violation after June 15, 1966, had little impact on election held more than 60 days later (A19), and ordered a rerun election. Where is there an expertise permitting total discretion when there is such disparity in findings? How can one equate the facts of this case with the findings in the 4 cases of *Gissel* and conclude any violations exceeding *Sinclair*. There are certainly many differences, especially with *Sinclair*. In *Gissel*, the findings were as follows: That the employer had interrogated employees about union activities; had threatened them with discharge and a promise of benefits; had, in fact, wrongfully discharged employees, and no election had been sought. In *Heck*, the employer had coercively interrogated employees; had threatened reprisals; had created surveillance; had offered benefits and had wrongfully discharged employees under Section 8 (a) (3). An election had been sought but never held. In *General Steel*, the company foreman interrogated employees about their union involvement; threatened them with discharge for union activities or voting for the union; had warned that strikes and other consequences would result; had made particular racist remarks; and, above all, had threatened endless negotiations with the union. An election was held in this case, won by the employer and set aside by the Board because of the violations committed in the pre-election

period. In these 3 cases, the Court found that the employers had committed substantial violations in an anti-union campaign, yet the Supreme Court found in all of the said 3 cases that a bargaining order was improper.

In *Sinclair*, the violations were considered more substantial. They consisted of talking to the employees to dissuade them from joining the union; emphasizing past strikes; advising the employees that the company would be bad off financially and the strike would lead to the closing of the plant; threatened to move the company to the manufacturing facilities of its parent company, and a consequent loss of jobs; wrote letters to the employees within two weeks of the election, and enclosed anti-union pamphlets; made a repeated communication 2 days before the election and enclosed additional pamphlets; and one day before the election made a personal appeal to the employees. It was this case that the Supreme Court found a bargaining order was appropriate since the substantial violations precluded the holding of another election under sterile laboratory conditions. We submit, that the instant case is sharply distinguished from the *Sinclair* case and, certainly, not even as pervasive or impermissible as the violations found in *Gissel*, *Heck* and *General Steel*. The Board's findings in this case, dissented to by one member thereof, and, in effect, overruling the trial examiner, was as follows: that 2 supervisors had stated that if the union came in the economic effect on the plant would be such that it would lead to a cancellation of certain benefits, to wit; a fishing trip, and a gift of a bond on special occasions; a suggestion by one of the alleged supervisors that a grievance committee be formed; the statement of a supervisor that the employees reject the union and negotiate directly with the employer; an overruled finding with respect to propriety of merit increase; and findings concerning majority status under the circumstances presented in this case. In none of the violative acts was there

any threat of reprisal or coercion. When examined in the light of the finding of the trial examiner that any violation had little effect, if any, on an election held more than 60 days after date of said violation, one must conclude, that, certainly on the date of the order of the Board herein two years later the climate existing in the plant was such that a new or re-run election was not only possible but preferable. The trial examiner's pragmatic remedy calling for the traditional cease and desist order and the holding of another election should have been more persuasive under proper judicial scrutiny, and the Court should have denied an enforcement order herein.

The exercise of free speech requires the attention of this Court in the case at bar. Congress, in support of such right of free speech, enacted law to protect the same under the First Amendment of the Constitution. Reference is made to 29 U. S. C. Paragraph 158C. The expression of any views, arguments or opinion in any form shall not constitute or be evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of a benefit. It protects the right of the employer to tell what he really believes will be the likely economic consequences by unionization that are outside of his control. This free speech doctrine pertaining in this case was one of the guidelines established in *Gissel, supra,* at page 617. Further reference is made to the case of *NLRB* v. *River Togs, Inc.*, 382 F. 2nd 198 and 201; also *Suprenart Manufacturing Co.* v. *NLRB,* 341 F. 2nd 156, 6th Circuit, and particularly page 159 thereof.

We further suggest that had the Board considered the case at bar after Gissel, it would have been required to make findings in accordance with Gissel. The grant of an enforcement order by the Court of Appeals herein in this case decided by the Board before Gissel is in conflict with decisions in other circuits. We refer to *NLRB* v. *American Cable Systems, Inc.*, 414 F. 2nd 661, 5th Circuit, *NLRB*

v. *Mink Dayton, Inc.*, 416 F. 2nd 327, 6th Circuit, *NLRB* v. *Alco Mining Co.*, 425 F. 2nd 1128, 5th Circuit, *NLRB* v. *Production Industries*, 425 F. 2nd 1206, 6th Circuit. The Courts in these cases remanded the respective cases back to the Board for express findings by the Board as to Gissel criteria.

We fear, however, that remanding of the instant case may not serve as the answer, for, in practice, the Board, having once found a violation either under 8(a)(1) or 8a(5), is not going to reverse itself. In the case of *NLRB* v. *Mink Dayton, Inc., supra*, after remand, the Board, as anticipated, did not change its position, and the Circuit Court upon further review in *NLRB* v. *Mink Dayton, Inc.*, 426 F. 2nd 256, stated that its hands were tied.

In the *American Cable* case, 5th Circuit, ruled that under Gissel the date of the order of the Board rather than the date of the violation should be determinative of the possibility for fair election. The Board later filed for Writ of Certiorari in Supreme Court arguing that the date of the unfair labor practice should be the date of determination, and the Supreme Court rejected the same as reported in the newspapers on December 15, 1970 and unreported otherwise.

We repeat that remanding back to the Board will not make a final determination herein unless the Appellate Courts, guided by principle of law as to the extent of their judicial review and scope, gives greater scrutiny to the issues in this case. We respectfully refer to *NLRB* v. *Brown, et al.*, 380 U. S. 278 (1965), and also 390 U. S. 272, 396 U. S. 264. Where, the Court said at page 290:

> "It is argued, finally that the Board's decision is within the area of its expert judgment and that, in setting it aside, the Court of Appeals exceeded the authorized scope of judicial review. This proposition rests upon our statement in Buffalo Linen that

in reconciling the conflicting interests of labor and management the Board's determination is to be subjected to 'limited judicial review.' 353 U. S., at 96. When we used the phrase 'limited judicial review' we did not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases. Courts are expressly empowered to enforce, modify or set aside, in whole or part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, National Labor Relations Act, as amended, P 10 (e), (f), 29 U. S. C., P. 160 (e), (f) (1958 ed.). Courts should be 'slow to overturn an administrative decision,' Labor Board v. Bobcock & Wilcox Co., 351 U. S. 105, 112, but they are not left 'to sheer acceptance' of the Board's conclusions, 'Republic Aviation Corp. v. Labor Board, 324 U. S. 793, 803'. Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such a review is always properly within the judicial province, and the courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determination of fact, so long as there is substantial evidence to be found in the record as a whole.

* * *. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'' *American Shipbuilding Co.* v. *Labor Board*, post, at 318''.

And at page 291:

> "* * *. Even where the Board is sustained, its analysis in support of its conclusion is subjected to full independent judicial review * * *."

While we agree that the Board should do everything to effectuate the policies of the Act, it, the Board, should recognize the rights not only of employers but those of employees as Mr. Justice Burger stated in *Local 57, International Labor Relations Board, Garwin Corp., supra*, "The right to choose a union and have that union operate in a climate free of coercion, which is the goal of Board compulsory bargaining orders, is a cornerstone of the National Labor Relations Act; equally protected by the Act with the right of the workers to choose that representative is the right to have none." See also Section 7 of the Act, *infra* (Appendix B, p. 1).

We recognize that the Act vests the Board with broad discretion to devise adequate remedies. Nevertheless, it is not permitted to act arbitrarily. In issuing a bargaining order in this case, we submit that such remedy was excessive, arbitrary and unreasonable, especially in view of the extensive guidelines of Gissel and its proper interpretations. We urge that the Board's order and the enforcement granted by the Circuit Court be reviewed and that this Court grant certiorari.

CONCLUSION

For the reasons set forth, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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